6712-01

This document is scheduled to be published in the Federal Register on 04/28/2022 and available online at **federalregister.gov/d/2022-09029**, and on **govinfo.gov**

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 17-84; FCC 22-20; FRS 83033]

Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on measures that the Commission may adopt to better align the financial incentives of utilities and attachers with respect to pole replacements. Specifically, the Commission seeks comment on the circumstances in which attachers should not be required to pay the entire cost of pole replacements needed to accommodate their new attachments and the proper allocation of costs in those situations, whether and how the Commission should revise its rules to address pole replacement cost issues, whether there are changes the Commission could make to its rules that would help utilities and attachers avoid disputes and expedite the resolution of pole attachment complaints, and the appropriate scope of refunds ordered by the Commission when it determines that a pole attachment rate, term, or condition is unjust and unreasonable.

DATES: Comments are due on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and reply comments are due on or before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by WC Docket No. 17-84, by any of the following methods:

- Federal Communications Commission's Web Site: https://apps.fcc.gov/ecfs/. Follow the instructions for submitting comments.

- Mail: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE Washington, DC 20554. Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20-304 (March 19, 2020), https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Michael Ray, Competition Policy Division, Wireline Competition Bureau, at (202) 418–0357, michael.ray@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Further Notice of Proposed Rulemaking* (Second Further Notice) in WC Docket No. 17–84, adopted March 16, 2022, released March 18, 2022. The full text of this document is available for public inspection on the Commission's website at https://www.fcc.gov/document/fcc-seeks-comment-resolving-disputes-over-pole-replacement-costs. To request materials in accessible

formats for people with disabilities (e.g. braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (e.g. accessible format documents, sign language interpreters, CART, etc.), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY).

Synopsis

I. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

1. In this *Second Further Notice*, we seek comment on ways to eliminate or expedite the resolution of pole replacement disputes by establishing clear standards for when and how utilities and attachers must share in the costs of a pole replacement that is precipitated by a new attachment request. In the *Pole Replacement Declaratory Ruling*, the Bureau found that it would be contrary to the Commission's rules and policies to require a new attacher to pay the entire cost of a pole replacement when a pole already requires replacement (e.g., because the pole is out of compliance with current safety and utility construction standards or it has been red-tagged) at the time a request for a new or modified attachment is made. According to the Bureau, even if the new attacher might benefit from that type of pole replacement, it is not "necessitated solely as a result" of the new attachment pursuant to the language in Section 1.1408(b) of our rules and therefore the utility may not impose all make-ready costs of that pole replacement on the new attacher. The Bureau based its clarification on the cost causation and cost sharing principles codified in Section 1.1408(b). We affirm the Bureau's findings in the *Pole Replacement Declaratory Ruling* as consistent with Section 224, the Commission's rules, and past Commission precedent.

2. On July 16, 2020, NCTA—the Internet & Television Association filed a Petition asking the Commission to clarify its rules in the context of pole replacements. The record developed in response to the NCTA Petition indicates significant disagreement between utilities and attachers about when a pole replacement is not "necessitated solely" by a new attachment when the circumstances do not involve a preexisting violation or red-tagged pole. We seek

comment on these more ambiguous situations and the role the Commission should take in providing further guidance regarding pole replacements. We also take this opportunity to seek comment on additional scenarios in which financial responsibility for pole replacements should be shared by attachers and utilities and how those costs should be apportioned. Additionally, we seek comment on the scope of utility liability for pole attachment rate refunds when rates are found to be unjust and unreasonable.

A. Determining the Applicability of Cost Causation and Cost Sharing

3. In the *Pole Replacement Declaratory Ruling*, the Bureau clarified, pursuant to the language in Section 1.1408(b) of our rules, that when a new attachment request precipitates a pole replacement, but the pole must also be replaced for other reasons, the pole replacement is not "necessitated solely" by the new attachment and all of the parties that benefit from the replacement must share proportionally in the cost, including utilities. Under this standard, and consistent with the *2018 Wireline Infrastructure Order*, the Bureau made clear that this standard applies when the pole must be replaced due to a preexisting violation or because it has been red-tagged.

4. We seek comment on whether there are additional situations in which a pole replacement is not "necessitated solely" by a new attachment request. Is it possible for a future planned pole replacement to serve as grounds for concluding that the pole must be replaced for other reasons at the time of the new attachment request? If so, in what circumstances? For example, if the utility has already scheduled the requested pole for replacement one or two years after the new attachment request is made, could we deem that known and scheduled replacement as necessary at the time that the new attachment request is made and therefore consider the replacement of the pole to not be "necessitated solely" by the new attachment? Should the Commission codify a definition of "necessitated solely" for the purposes of Section 1.1408(b) and, if so, what should that definition be? When considering situations "necessitated solely" by a need to create capacity for a new attachment, should the term "capacity" refer to both

additional space needed to accommodate the new attachment and/or the need for a stronger pole to increase loading capacity? Should the Commission codify a definition of "red-tagging" or other terminology that distinguishes between priority replacements that need to be performed immediately due to the status of a pole from non-priority replacements that may be implemented at a later time? The Commission has previously described a "red-tagged" pole as one found to be non-compliant with safety standards and placed on a utility's replacement schedule. Crown Castle argues that the Commission should employ a broader definition that includes "any pole where, based on an existing condition, the utility contends the pole must be replaced before any new attachment, or change to an existing attachment, may be made."

5. Even if a pole replacement is necessitated for a reason other than a new attachment request, Section 1.1408(b) requires existing attachers (including the utility) to pay a proportional share of the replacement costs only if they "directly benefit" from the replacement. The Commission has previously determined that an incidental benefit is not sufficient to hold these attachers accountable for the pole replacement costs. When addressing additional circumstances to which the clarification in the *Pole Replacement Declaratory Ruling* should apply, if any, we ask that commenters specify whether any benefits that accrue to existing attachers are direct versus incidental and how they define those terms for the purposes of their arguments. We ask that commenters be clear about the criteria that distinguish a direct benefit from an incidental benefit and cite all economic and legal authorities that support their positions.

6. We seek comments specifically addressing whether a utility directly benefits from a pole replacement that is necessary to correct a preexisting violation that the utility did not cause. As stated in the *2018 Wireline Infrastructure Order*, utilities may not hold new attachers responsible for the costs of correcting a preexisting violation. That does not necessarily mean, however, that the utility is ultimately responsible for all of the costs in all cases. Rather, the party that is responsible for the violation is responsible for the costs of correcting the violation, and the utility is authorized to seek recovery from the violating party. What are the

circumstances under which existing attachers, as opposed to utilities, may be responsible for preexisting violations that require an entire pole to be replaced? In such situations, are there ways that a utility directly benefits from a pole replacement that corrects a preexisting violation within the meaning of the first two sentences of Section 1.1408(b), even if it did not cause the violation? For instance, in concluding that a utility may not hold a new attacher responsible for costs arising from the correction of safety violations caused by other attachers, the former Cable Services Bureau determined that it was up to the utility "to require other attachers to reimburse [the utility] or otherwise pay for corrections of safety violations." In *the 2018 Wireline Infrastructure Order*, the Commission found that a utility may not hold a new attacher responsible for the costs of a preexisting violation caused by another attacher or delay the completion of make-ready to accommodate a new attachment while it "attempts to identify or collect from the party who should pay for correction of the preexisting violation." In the context of pole replacements, should we construe these precedents to mean that the utility is responsible for the costs of correcting the violation vis-à-vis the new attacher, and, therefore, directly benefits when the pole replacement needed to accommodate the new attachment corrects the violation? If so, does that financial responsibility and direct benefit require the utility to share in the costs of the replacement under Section 1.1408(b)?

7. We also seek comment on how to identify and quantify the costs of a pole replacement that are proportional to the direct benefit obtained by a utility from a pole replacement that is not necessitated solely by a new attachment request. We remain committed to the long-standing principle that when "capital costs would not have been incurred 'but for' the pole attachment demand . . . the attacher—the cost causer—pays for these costs." In the context of make-ready charges for a new attachment, that includes the "direct incremental costs of making space available to the [attacher]," but excludes costs that are not required to accommodate the new attachment. Make-ready is "the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the

utility pole." Make-ready charges to prepare a pole for a new attachment are "non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation."

8. How should we distinguish the incremental costs attributable to the new attacher from the costs that should be attributable to utilities when a pole replacement is necessary to make space for the new attachment and for a reason that directly benefits the utility? In the context of a pole that also needs to be replaced to correct a preexisting violation or because it has been red-tagged, should the new attacher be responsible for the difference in cost between a taller or stronger pole needed to accommodate its attachment and what it would cost to replace the existing pole with one of the same type and size or strength? Is there a different way to apportion the cost of the new pole between its owner and the new attacher? How should other costs associated with pole replacements, such as the cost of transferring existing attachments to the new pole, be apportioned between the utility and new attacher? We ask that commenters submit data and documents describing and substantiating the precise costs of pole replacements in each scenario addressed above and specify the party that causes them to be incurred.

9. Finally, we seek comment on whether we should revise our cost allocation rules to modify or replace the direct benefit versus incidental benefit standard set forth in Section 1.1408(b). Is there a more equitable and efficient standard for determining when parties should share in the costs of modifying a facility? What are the costs and benefits of applying an alternate standard? We ask that commenters proposing alternate standards detail how costs would be allocated under the proposed standard's terms in real-world scenarios, specifically addressing the economic and operational impacts on the parties, including whether the standard would allow utilities to fully recover the costs of establishing additional capacity on their poles. We also ask that commenters explain whether any proposed alternate standard would promote or deter broadband deployment or the ability of utilities and attachers to successfully negotiate pole attachment agreements, including whether it would lead to an increase or decrease in pole

attachment disputes.

B. Allocating Costs When Utilities Directly Benefit from Pole Replacements

10. Attachers have represented to the Commission that utilities often seek to hold them responsible for all costs of replacing a pole that is needed to make space for a new attachment, even if all of those costs are not needed to accommodate the new attachment (e.g., pole upgrades, increasing capacity beyond the needs of the new attachment). While some utilities indicate that this is not the case and that new rules in this area are unnecessary, others have not denied it or have attempted to justify it with a broad interpretation of the Commission's cost causation policy, i.e., but for the new attachment request, the pole replacement would not have occurred at all, so the attacher should pay all costs of the replacement. Stated differently, some utilities contend that while implementing a pole replacement is necessitated solely by the new attachment, they should be able to enhance the pole in some way that is not necessitated by the new attachment without incurring financial responsibility for those enhancements. Attachers have also argued that utilities receive a windfall when they hold new attachers responsible for all the costs of a pole replacement because it eliminates or reduces the costs they would have otherwise had to pay to replace the pole in the future (i.e., financial responsibility for the utility's deteriorating and aging infrastructure is shifted to the attacher). In particular, the white paper submitted by Charter's economist, Dr. Patricia Kravtin, states that "since the future replacement of the pole from the utility's perspective is 'an inevitable event' that it would eventually have to pay for itself, the practice of transferring the full cost of that replacement onto new attachers (who must either pay to obtain access or choose to abandon their investment plans) results in burdens to the attaching entity far exceeding the costs they actually cause the pole owner to incur over a more meaningful time horizon." We seek comment on the conclusions reached by Dr. Kravtin as they relate to the cost allocations and causes of pole replacements. Utilities counter that the early retirement of their poles precipitated by a new attachment comes at a cost—the value they lose in a capital asset that has not yet reached the end of its useful life—and that under

the Commission's cost causation policy, they are entitled to compensation for the unrealized value of a pole that would otherwise remain in service.

11. While we acknowledge that the economic and legal arguments made by utilities could have merit, we are concerned by the frequent statements in the record that attachers are being required to absorb costs that are not caused by their attachments and/or result in attachers assuming financial responsibility for a utility's capital assets. Our concern is rooted in the potential impact on the deployment of broadband networks if the financial resources available for deployments are depleted by these costs. That said, we are keenly aware of the need to carefully examine the impact any changes to our cost allocation rules may have on the ability of utilities to fully recover the costs of expanding capacity to accommodate new attachments to avoid the unintended consequence of increased attachment denials. Section 224 does not provide the Commission with authority to require utilities to replace poles when additional capacity is needed to accommodate a new attachment. Utility commenters argue that "[i]f utilities are no longer compensated for pole replacements and can no longer control the pole replacement process, many utility pole owners will decide they can no longer economically or safely replace poles on a voluntary basis for new attachers. The 'clarification' would deny new attachers access to poles that require replacement to accommodate them."

12. To evaluate and resolve these competing concerns, we seek comment on whether the Commission should revise its pole attachment rules to expressly recognize that utilities directly benefit from pole replacements that are precipitated by a new attachment request and establish clear standards for when and how utilities should be required to pay a proportional share of the total pole replacement costs. We limit our inquiries to situations where a pole replacement is needed to accommodate a new attachment due to lack of capacity. We are aware of allegations by attachers that some utilities erroneously or disingenuously claim that an existing pole lacks capacity to accommodate a new attachment and insist that the pole must be replaced at the attacher's cost. The rules clearly prohibit such conduct by utilities, and the

Commission is fully capable of adjudicating such disputes through its complaint process, and we believe that is the appropriate avenue for attachers asserting such claims to seek relief. Would clear standards on these points expedite cost dispute resolution between the parties? Or, are any disputes likely to be fact-specific and better addressed in adjudicatory proceedings? Are further cost allocation rules for pole replacements unnecessary and/or could they result in more attachment requests being denied as some utilities claim?

1. Responsibility for Pole Upgrades and Modifications Unrelated to New Attachments

13. Attachers have represented to the Commission that, when a pole replacement is needed to expand capacity for a new attachment, utilities use that pole replacement as an opportunity to upgrade a pole (e.g., increase its class or grade) or expand their own use of the pole in a manner that is unrelated to the new attachment (e.g., expand capacity for future use by the utility itself or to rent to a different attacher). When that occurs, attachers represent that they are held accountable for the cost of upgrade/expanded use modifications made at the same time as the make-ready for their new attachments. According to NCTA, utilities insist that they are entitled to shift those costs to the new attacher because, even if the upgrade/expanded use modifications are not required to effectuate the new attachment, the utility would not have made them if a pole replacement had not been required to accommodate the new attachment. Attachers argue that, under the Commission's rules and precedent, they may not be held accountable for such costs because they are not necessitated by the new attachment. Utilities who shift the costs of upgrade/expanded use modifications to new attachers claim that, as described above, the pole replacement required to accommodate the new attachment is the "but for" cause of those modification costs. We note that some utilities have represented to the Commission that they do not hold new attachers responsible for pole upgrades that are not required by a new attachment and that new rules are unnecessary in this area.

14. We seek comment on whether utilities directly benefit when they use pole

replacements precipitated by an attachment request to upgrade or enhance their poles and whether utilities should pay a proportional share of the total pole replacement costs. As an initial matter, we seek comment on whether the Commission's existing cost allocation rules and precedent require clarification on this point. Section 1.1408(b) of the Commission's rules states, in pertinent part, that "[t]he costs of modifying a facility shall be borne . . . by all parties that directly benefit from the modification," and that each party that directly benefits from the modification shall share proportionally in its costs, but it then qualifies that language by stating, "[n]otwithstanding the foregoing, a party with a preexisting attachment to a pole . . . shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment . . . sought by another party." If a pole upgrade is necessitated at the time a pole is replaced to create capacity for a new attachment, does the text of Section 1.1408(b) allocate all costs of the pole replacement, including those for unrelated upgrade/expansion modifications, to the new attacher? Or does it merely shield other attachers, and not the utility, from bearing any upgrade costs? We note that the text of Section 1.1408(b) does not appear to include replacing a pole after receiving a modification request as an instance of "piggybacking." The third sentence of the rule states that "[a] party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification . . . it adds to or modifies its attachment." While a "facility" may include a pole and a "modification" includes replacing a pole, adding to or modifying an attachment is not the same thing as installing a new, upgraded pole.

15. In the *Local Competition Order*, the Commission stated that an attacher is responsible for the entire cost of a new pole needed to create new capacity for its attachment "unless [other parties with attachments] expanded their own use of the facilities at the same time." In the latter event, the other parties that expanded their own use of the facilities would need to share in the cost of the new pole. This language is broader than the text of Section

1.1408(b) of the Commission's rules. Whereas the rule text speaks to pole replacements that are "necessitated solely as a result of" the new attachment, the language in the *Local Competition Order* addresses situations where the pole replacement is an "opportunity" for the utility and other attachers to "expand their own use" of the new pole.

16. We seek comment on how to reconcile these cost attribution standards in the Commission's rules and precedent in the context of a utility using a pole replacement that is "necessitated solely" by a new attachment request as an opportunity to upgrade the requested pole in a manner that is not required by the new attachment. Does Section 1.1408(b) of our rules limit the cost-sharing statements in our precedent? Do the statements in our precedent establish a cost-sharing standard for a set of facts that is not contemplated by the codified rule?

17. Should the Commission address this issue by revising Section 1.1408(b) to expressly create a presumption that utilities directly benefit when they use a pole replacement precipitated by a new attachment request as an opportunity to upgrade the pole or expand it for its own use and should, therefore, pay a proportional share of the pole replacement costs? If so, what are the specific circumstances to which such a presumption would apply? Specifically, we seek comment on when an upgrade or expanded use of a pole by a utility confers an incidental versus direct benefit to a utility. For instance, NCTA and other commenters urge us to require utilities to share in the costs of a pole replacement that results in the utility obtaining excess capacity for its own use. The Commission has previously stated that, while that excess capacity may confer benefits on utilities, utilities are not under any obligation to share the future revenue they may receive due to that excess capacity, even if they did not share in the costs of the modification that created the excess capacity. Further, the Commission found that excess pole capacity could be "particularly cumbersome" if it remains unused for extended periods. Should these statements be understood to mean that the Commission has considered excess pole capacity to be an incidental benefit of a pole replacement rather than a direct benefit? Are there grounds for the Commission to conclude that excess capacity resulting from a pole replacement is a direct

benefit to utilities and they should, therefore, share in the replacement costs? Are there other benefits that a utility obtains when a pole is replaced to accommodate a new attachment that the Commission should treat as incidental as opposed to direct? Or, as utilities claim, is it unnecessary to modify our rules to address cost allocation when utilities use a new attachment request that precipitates a pole replacement as an opportunity to upgrade the pole or expand it for its own use? In addressing these questions, we ask that commenters be specific with respect to how they are defining incidental and direct benefits, their economic bases for those definitions, and how they apply or do not apply to each circumstance proposed as a benefit to utilities.

18. If the Commission were to adopt the presumption described above, what would be a proportional allocation of the costs of a pole replacement that is precipitated by a new attacher and then used as an opportunity for the utility to upgrade or expand its use of the pole? What are the incremental costs of upgrading the class or grade of the taller pole being installed to accommodate the new attachment? Should the new attacher be responsible for the difference in cost between a taller pole of a same type as the existing pole and the upgraded pole, along with other typical make-ready costs of a new attachment (e.g., the cost of transferring existing attachments to the new pole)? If not, what measure should be used? If the Commission revisits its position on the installation of excess pole capacity, should those costs be apportioned in a manner similar to when multiple attachers use an attachment request to upgrade their existing facilities, requiring expanded pole capacity, i.e., a ratio of the new space on the taller pole occupied by the new attacher to the total amount of excess capacity on the taller pole?

19. We also seek comment on whether adopting a presumption that utilities directly benefit from pole replacements precipitated by a new attachment when the utility uses the pole replacement as an opportunity to upgrade or expand its use of the pole would have a positive or negative effect on pole attachment negotiations and, relatedly, the deployment of broadband facilities. Would it facilitate and expedite successful negotiations by eliminating areas of dispute? Conversely, would it increase the frequency of pole attachment denials and delay the

deployment of broadband networks due to utility concerns that they will not be fully compensated for the costs caused by the attachments? Are there potential adverse impacts for utility ratepayers? If so, would any of these adverse impacts be lessened if the Commission were to recognize specific circumstances under which the presumption could be rebutted? What would those circumstances be? What evidentiary showing would utilities need to make to substantiate that circumstances exist to rebut the presumption? Do these considerations vary based on whether the pole is located in an "unserved area," and, if so, how should that term be defined in this context?

20. Additionally, we seek comment on how the last sentence of Section 1.1408(b) should be interpreted with respect to pole replacements. That sentence states, "If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment." What time period is reasonable "after" the pole replacement occurs for the subsequent attacher to share in the costs of the pole replacement? Would any subsequent attachment to a new pole be considered "rendered possible" by the pole replacement even if it occurred a significant time later?

2. Costs and Benefits of Early Pole Retirement

21. According to NCTA and other attachers, "[p]oles, like other utility infrastructure, have a finite life and require maintenance and intermittent replacement. Replacing an older pole with a new one necessarily allows the utility to defer the next scheduled replacement, including transfer of its facilities to the new pole, and reduces maintenance costs." In NCTA's view, "where existing utility infrastructure is . . . near the end of its useful life, it is unjust and unreasonable [under Section 224(b) of the Act] for pole owners to shift the entire cost of a pole replacement to a new attacher when the pole owner itself derives the predominant financial gain, including in the form of betterment, from replacing and upgrading the pole." Attachers argue that utilities should, therefore, be required to pay a proportional share of pole replacement costs

whenever a pole is replaced to accommodate a new attachment, and irrespective of whether they have otherwise improved the pole. NCTA also argues that shifting the entire cost of a pole replacement to a new attacher is inconsistent with Section 224(f) of the Act because it discriminates against new attachers "seeking to bring broadband to an unserved area by imposing unjust and unreasonable conditions upon access."

22. Utilities counter that the attachers' position is barred by Section 1.1408(b) of the Commission's rules, which mandates that new attachers bear the costs of pole replacements necessitated solely as a result of their new attachments. They also assert that the attachers misstate or misunderstand the process and economics of scheduling a pole for replacement. The record indicates that utilities use internal pole replacement programs to determine when a pole needs to be replaced because it is unsafe, unreliable, or unfit. These programs involve inspections scheduled at periodic intervals during which the condition of a pole is evaluated. If the pole is deemed to be in poor condition or reaching the end of its useful life—a status that utilities emphasize is distinct from a pole's age—the utility will schedule it for replacement. The timing of that replacement appears to vary based on the provisions of a particular utility's replacement program, but a pole that is deteriorating but still safe and serviceable may not be scheduled for replacement for a period of years after the inspection. For example, the POWER Coalition explains that its members conduct their inspections at 8-10 year cycles and that if it is determined that a pole is not likely to remain serviceable until the next cycle (i.e., for another 8-10 years), it will be replaced in one to two years. Utilities argue that when those pole replacements are accelerated to create capacity for new attachments, they lose the value of their capital asset that is being retired before it has reached the end of its useful life. For these reasons, utilities dispute that they obtain a benefit when a pole is replaced before the end of its useful life. Rather, they argue that requiring a new attacher to pay the costs of the pole replacement ensures that utilities are compensated for, among other things, the lost value of an asset that would otherwise remain in service for years. Some utilities have also indicated that

state-level oversight of their capital budgets and spending cycles limits their flexibility to assume increased capital expenditures in a given year to accommodate communications deployments.

23. We seek additional information and documents that will better substantiate the economic, legal, and practical implications of potentially revising our rules governing cost sharing. We are particularly interested in additional information and analyses that expand the economic arguments made by utilities and attachers, including those addressing their respective economic incentives and how our rules do or do not effectively align them. We recognize that our current cost sharing rules have been interpreted to shift the financial responsibility of utilities for maintaining and replacing their capital assets to attachers, and that this shift inflates attachers' pole attachment costs. We also recognize that the ability of utilities to deny access to their poles due to insufficient capacity, together with the substantial cost to attachers having to deploy underground infrastructure in lieu of an attachment, potentially confers significant leverage to utilities that may disadvantage attachers in negotiations to obtain what they believe is an equitable allocation of pole replacement costs. Utilities counter that if they are prevented from fully realizing the value of their infrastructure assets when a new attachment request requires the early retirement of an otherwise serviceable pole, there is little incentive for them to approve the request.

24. We seek comment on whether revising our pole attachment rules to require utilities to pay some portion of the costs of replacing a pole that is necessitated solely to accommodate a new attachment would better align the economic incentives of the parties, or whether it would, as some utilities suggest, simply incent utilities to deny access to the pole in this circumstance. If we were to revise our rules on this point, what standards or formula should be used to apportion the costs between the utility, the new attacher, and any other existing attachers? Should we adopt NCTA's suggestion that new attachers be responsible for the remaining net book value of the pole being replaced, measured by the average depreciated bare pole investment derived using the Commission's pole attachment rate formula? If we were to

adopt that standard, what, if any, additional costs would need to be allocated to the new and/or existing attachers to ensure that utilities are compensated for the costs of attachments to their poles? What, if any, impact would the standard proposed by NCTA have on pole attachment rates, costs borne by existing attachers other than the utilities, and utility ratepayers? The Electric Utilities argue that shifting some of the cost of pole replacements to utilities "would actually discriminate against existing attachers that have already paid the actual cost of make-ready necessary to accommodate their attachments." According to Electric Utilities "[i]f electric utilities are bearing the vast majority of make-ready pole replacement costs, then those costs will be booked to the appropriate capital and O&M accounts (principally FERC Accounts 364 and 593), which will, in turn, lead to an increase in pole attachment rates paid by all attaching entities subject to the FCC's formulas." Is there a different standard of cost allocation that would better balance the incentives of the parties, be administratively simple to apply, and be more amenable to utilities? Have states that regulate pole attachments adopted rules specifying how to allocate the upfront cost to replace a pole between utilities and attachers that the Commission should consider adopting or modifying for its own use?

25. We also seek comment on the relationship between the upfront costs incurred to replace a pole versus the recovery of pole replacement costs through recurring pole attachment rates. Specifically, would it be more efficient and effective to require all costs incurred to replace a pole (except where a pole replacement is solely necessitated by a new attachment) to be recovered over time through the allowance for depreciation reflected in recurring rates calculated pursuant to the Commission's pole attachment rate formulas, rather than upfront through make-ready fees? Would the utility be made whole for early replacement of a structurally sound pole through the allowance for depreciation expense reflected in recurring pole rental rates, given the use of accurate depreciation rates? Do utilities use group depreciation for poles? Do utilities' pole depreciation rates equally reflect the probability of late pole replacement, relative to average expected useful life, and the probability of early replacement, whether caused by the addition of

an attachment or by some other reason? Under this approach, would the allowance reflected in recurring pole attachment rates through the application of the rate of return component of the carrying charge rate to the net cost of a bare pole, as in the Commission's rate formula, fully compensate the utility for the cost of capital used to finance the remaining undepreciated cost of a replacement pole? Pole replacement costs (other than for pole replacements solely necessitated by a new attachment) under this approach would be allocated in the same way that capital, maintenance, and administrative costs are allocated under the Commission's recurring pole attachment rate formulas. Would this approach reduce barriers to entry and at the same time send efficient pricing signals for pole investment and broadband deployment? Would this approach reduce cost allocation and rate disputes related to pole replacement? Could such an approach be used for recovery of all upfront pole replacement costs, regardless of the reason for replacement? What are the advantages and disadvantages of such an approach?

26. If we were to adopt a standard for allocating the costs of a pole replacement precipitated by a new attachment between utility and attachers, should utilities be able to contest that the allocation is sufficiently compensatory during negotiations with attachers and, if necessary, in complaint proceedings at the Commission, and what showing would be required for them to do so?

27. To help us understand the scale of the pole replacement costs at issue, we seek data from attachers for a broad sample of recent, large broadband network buildouts showing the total number of poles to which they attached and, of those poles, the number for which they paid the full cost to replace an existing pole. For each project identified, we ask that attachers specify the total non-recurring costs of the project (i.e., costs for the physical material of the poles and any and all other assets, such as fiber and electronic equipment, and labor costs for design, engineering, and construction of the network) and the total non-recurring cost specifically for replacement poles. We ask that attachers and utilities provide information concerning the condition of the poles that were replaced and their status within the utility's pole inspection and

replacement program, including any available information concerning the term of the pole's useful life. We also request that utilities provide data from their year-end 2021 accounts showing: (1) gross pole investment; (2) accumulated pole depreciation expense; (3) accumulated deferred income taxes attributable to poles; (4) net pole investment (i.e., gross pole investment minus accumulated depreciation expense minus accumulated deferred income taxes, a result that is equivalent to the net cost of a bare pole under the Commission's pole attachment formulas); and (5) pole investment excluded from gross pole investment (to avoid double recovery of the same pole costs through the collection of both non-recurring make-ready and recurring rental fees).

28. We seek comment on whether revising our cost sharing rules to recognize that utilities directly benefit from pole replacements needed to create capacity for new attachments and should pay a proportional share of those costs would have a positive or negative impact on the negotiation of pole attachment agreements and broadband deployment. As the Commission has previously recognized, Section 224 of the Act does not authorize us to mandate that utilities replace poles to create capacity for new attachments. We ask that commenters supporting or recommending specific cost allocation methodologies address why their favored solution will expedite pole attachment approvals without increasing denials, benefit consumers by connecting more people to broadband, and otherwise be in the public interest. We also seek comment on whether there are constraints on a utility's ability to deny attachment based on lack of capacity, such as the nondiscrimination requirement in Section 224(f)(2) of the Act. For instance, if a utility itself provides broadband, would it be discriminatory to deny attachment to another broadband provider based on lack of capacity?

C. Avoiding and Resolving Disputes Between Utilities and Attachers

29. In addition to the questions above, we seek comment on additional measures that the Commission could adopt that would enable attachers and utilities to avoid pole replacement disputes and/or quickly resolve them when they occur. For instance, ExteNet argues that the

Commission should require utilities to provide potential attachers with information concerning the condition of, and replacement plans for, their poles. Would disputes concerning the need for pole replacements and associated costs be avoided if attachers had access to such information when planning their deployments? What specific data points would utilities need to provide potential attachers for such disputes to be avoided? What mechanism could utilities use to provide such information to attachers if required to do so (e.g., an internal utility database) and what costs would be associated with establishing the mechanism(s)? Does the Commission have jurisdiction to require utilities to provide potential attachers with information concerning the status of their poles? Are there any other revisions or additions that the Commission can make to its rules that would enable parties to avoid disputes concerning pole replacements or facilitate the private resolution of those disputes? Beyond the topic of pole replacements, are there other recurring issues with the pole attachment process that hinder the ability of broadband providers to deploy new facilities? Are there other infrastructure-related barriers that broadband providers are facing in their efforts to quickly deploy broadband? What steps should the Commission take to address these and other problems that may arise, and to accelerate their resolution?

30. When pole replacement disputes cannot be avoided or resolved privately by the parties, are there additional procedures the Commission should adopt to expedite the resolution of pole attachment complaints? In November 2017, the Commission established a 180-day shot clock for the Enforcement Bureau to resolve pole access complaints. NCTA argues that the Commission should take the additional step of announcing policies favoring the placement of pole attachment complaints arising in unserved areas on the Accelerated Docket, which requires that proceedings on a complaint be concluded within 60 days. We seek comment on whether such a step is necessary given the 180-day shot clock for pole access complaints and the discretion already afforded to Commission staff to place a complaint on the Accelerated Docket if they deem it suitable. We seek comment on the specific criteria the Commission would include in a policy that would guide Commission staff on when pole attachment complaints

should be placed on the Accelerated Docket. For example, should the Commission's policy take into account the number and complexity of the claims, need for discovery, need for expert affidavits, and ability of the parties to stipulate to facts? If the Commission were to adopt a policy that favors including pole attachment complaints on the Accelerated Docket, should it be limited to complaints that raise only discrete pole access issues and do not require the Commission to consider whether a rate, term, or condition of attachment is unjust or unreasonable? We also seek comment on any other procedural mechanisms that would expedite the resolution of complaints before the Commission concerning pole replacements. We also seek comment on whether there is additional clarity the Commission can provide on the scope of refunds available under the Commission's existing rules governing pole attachment complaints.

31. The Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

II. INITIAL REGULATORY FLEXIBILITY ANALYSIS

32. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rule changes proposed in this *Second Further Notice*. The Commission requests written public comment on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice*. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of

the Small Business Administration (SBA). In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

A. Need for, and Objectives of, the Proposed Rule Changes

33. The *Second Further Notice* seeks comment on ways to eliminate or expedite the resolution of pole replacement disputes by establishing clear standards for when and how the cost causation and cost sharing requirements in Section 1.1408(b) of the Commission's rules apply to pole replacements. The *Second Further Notice* specifically seeks comment on situations in which a pole replacement is not "necessitated solely" by a new attachment request, whether and to what extent utilities directly benefit from various types of pole replacements, and if the Commission should establish standards for when utilities should be required to pay a proportional share of pole replacement costs. Additionally, the *Second Further Notice* seeks comment on whether the Commission should adopt an express presumption with regard to whether utilities directly benefit when they use pole replacements precipitated by attachment requests to upgrade or enhance their poles, as well as whether the Commission has previously embraced or rejected such a presumption. Comments are also sought regarding the circumstances in which such a presumption would apply, how relevant costs would be allocated, and whether this presumption would positively or negatively impact pole attachment negotiations and, relatedly, broadband deployment.

34. The *Second Further Notice* also seeks comment on the costs and benefits of early pole retirements. Specifically, when retiring a pole early to accommodate a new attachment, the *Second Further Notice* seeks comment on whether a revision of the Commission's pole attachment rules to require utilities to pay a portion of the costs of the pole replacement would help to align parties' economic incentives. The *Second Further Notice* seeks comment on whether it would be more efficient and effective to require all costs incurred to replace a structurally sound pole for reasons other than insufficient capacity to be recovered over time through the allowance for depreciation reflected in recurring rates calculated pursuant to the

Commission's pole attachment rate formulas, rather than upfront through make-ready fees. It also seeks comment on whether a revision of the Commission's cost sharing rules to recognize that utilities directly benefit from pole replacements that create capacity for new attachments and should thus pay a proportional share of the costs would positively or negatively affect negotiations of pole attachment agreements and broadband deployment. The *Second Further Notice* seeks comment on whether the Commission should explicitly define certain key terms related to pole replacements and the rules governing them, including "necessitated solely" and "red-tagged." Finally, the *Second Further Notice* seeks comment on measures the Commission could adopt to avoid disputes concerning pole replacements and expedite the resolution of complaints concerning pole replacements and provide more clarity with respect to the scope of refunds and payments that may be ordered if the Commission determines that a pole attachment rate, term, or condition is unjust and unreasonable.

B. Legal Basis

35. The proposed action is authorized under Sections 1-4, 201, 202, 214, 224, 251, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151-54, 201, 202, 214, 224, 251, and 303(r).

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

36. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act." A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

37. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.

38. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

39. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." U.S. Census Bureau data from the 2017 Census of Governments indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of "small governmental jurisdictions."

40. *Wired Broadband Internet Access Service Providers. (Wired ISPs)*. Providers of

wired broadband internet access service include various types of providers except dial-up internet access providers. Wireline service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission's rules. Wired broadband internet services fall in the Wired Telecommunications Carriers industry. The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, according to Commission data on internet access services as of December 31, 2018, nationwide there were approximately 2,700 providers of connections over 200 kbps in at least one direction using various wireline technologies. The Commission does not collect data on the number of employees for providers of these services, therefore, at this time we are not able to estimate the number of providers that would qualify as small under the SBA's small business size standard. However, in light of the general data on fixed technology service providers in the Commission's 2020 Communications Marketplace Report, we believe that the majority of wireline internet access service providers can be considered small entities.

41. *Internet Service Providers (Non-Broadband)*. Internet access service providers using client-supplied telecommunications connections (e.g., dial-up ISPs) as well as VoIP service providers using client-supplied telecommunications connections fall in the industry classification of All Other Telecommunications. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. For this industry, U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Consequently, under the SBA size standard a majority of firms in this industry can be considered small.

42. *Wired Telecommunications Carriers*. The U.S. Census Bureau defines this

industry as establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.

43. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 5,183 providers that reported they were engaged in the provision of fixed local services. Of these providers, the Commission estimates that 4,737 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

44. *Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include both incumbent and competitive local exchange service providers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S.

Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 5,183 providers that reported they were fixed local exchange service providers. Of these providers, the Commission estimates that 4,737 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

45. *Incumbent Local Exchange Carriers (Incumbent LECs)*. Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 1,227 providers that reported they were incumbent local exchange service providers. Of these providers, the Commission estimates that 929 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

46. *Competitive Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for

2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 3,956 providers that reported they were competitive local exchange service providers. Of these providers, the Commission estimates that 3,808 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

47. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 151 providers that reported they were engaged in the provision of interexchange services. Of these providers, the Commission estimates that 131 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of providers in this industry can be considered small entities.

48. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The closest applicable industry with an SBA small business size standard is Wired Telecommunications Carriers. The SBA small business size standard classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service

Monitoring Report, as of December 31, 2020, there were 32 providers that reported they were engaged in the provision of operator services. Of these providers, the Commission estimates that all 32 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, all of these providers can be considered small entities.

49. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 115 providers that reported they were engaged in the provision of other toll services. Of these providers, the Commission estimates that 113 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

50. The broadband Internet access service provider category covered by these new rules may cover multiple wireless firms and categories of regulated wireless services. Thus, to the extent the wireless services listed below are used by wireless firms for broadband Internet access service, the actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of

assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

51. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 715 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

52. *Wireless Communications Services*. Wireless Communications Services (WCS) can be used for a variety of fixed, mobile, radiolocation, and digital audio broadcasting satellite services. Wireless spectrum is made available and licensed for the provision of wireless communications services in several frequency bands subject to Part 27 of the Commission's rules. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

53. The Commission's small business size standards with respect to WCS involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in WCS. When bidding credits are adopted for the auction of licenses in WCS frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in the designated entities section in Part 27 of the Commission's rules for the specific WCS frequency bands.

54. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

55. *1670–1675 MHz Services*. These wireless communications services can be used for fixed and mobile uses, except aeronautical mobile. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

56. According to Commission data as of November 2021, there were three active licenses in this service. The Commission's small business size standards with respect to 1670–

1675 MHz Services involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For licenses in the 1670-1675 MHz service band, a "small business" is defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and a "very small business" is defined as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years. The 1670-1675 MHz service band auction's winning bidder did not claim small business status.

57. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

58. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite). The size standard for this industry under SBA rules is that a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 407 providers that reported they were engaged in the provision of cellular, personal communications services, and specialized mobile radio services. Of these providers, the Commission estimates that 333 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size

standard, most of these providers can be considered small entities.

59. *Broadband Personal Communications Service*. The broadband personal communications services (PCS) spectrum encompasses services in the 1850-1910 and 1930-1990 MHz bands. The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

60. Based on Commission data as of November 2021, there were approximately 5,060 active licenses in the Broadband PCS service. The Commission's small business size standards with respect to Broadband PCS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. In auctions for these licenses, the Commission defined "small business" as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and a "very small business" as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years. Winning bidders claiming small business credits won Broadband PCS licenses in C, D, E, and F Blocks.

61. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing

these, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

62. *Broadband Personal Communications Service*. The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These standards, defining "small entity" in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40% of the 1,479 licenses in the first auction for the D, E, and F Blocks. On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22. Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

63. *Specialized Mobile Radio Licenses*. Special Mobile Radio (SMR) licenses allow licensees to provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz spectrum bands on a commercial basis including but not limited to services used for voice and data communications, paging, and facsimile services, to individuals, Federal Government entities, and other entities licensed under Part 90 of the Commission's rules. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire

year. Of this number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 119 providers that reported they were of SMR (dispatch) providers. Of this number, the Commission estimates that all 119 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, these 119 SMR licensees can be considered small entities.

64. Based on Commission data as of December 2021, there were 3,924 active SMR licenses. However, since the Commission does not collect data on the number of employees for licensees providing SMR services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard. Nevertheless, for purposes of this analysis the Commission estimates that the majority of SMR licensees can be considered small entities using the SBA's small business size standard.

65. *Lower 700 MHz Band Licenses*. The lower 700 MHz band encompasses spectrum in the 698-746 MHz frequency bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

66. According to Commission data as of December 2021, there were approximately

2,824 active Lower 700 MHz Band licenses. The Commission's small business size standards with respect to Lower 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For auctions of Lower 700 MHz Band licenses the Commission adopted criteria for three groups of small businesses. A very small business was defined as an entity that, together with its affiliates and controlling interests, has average annual gross revenues not exceeding $15 million for the preceding three years, a small business was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and an entrepreneur was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses, twenty-six winning bidders claiming a small business classification won 214 licenses, and three winning bidders claiming a small business classification won all five auctioned licenses.

67. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

68. *Upper 700 MHz Band Licenses*. The upper 700 MHz band encompasses spectrum in the 746-806 MHz bands. Upper 700 MHz D Block licenses are nationwide licenses associated with the 758-763 MHz and 788-793 MHz bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new

broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

69. According to Commission data as of December 2021, there were approximately 152 active Upper 700 MHz Band licenses. The Commission's small business size standards with respect to Upper 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a "very small business" an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.

70. *Air-Ground Radiotelephone Service*. Air-Ground Radiotelephone Service is a wireless service in which licensees are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft. A licensee may provide any type of air-ground service (i.e., voice telephony, broadband Internet, data, etc.) to aircraft of any type, and serve any or all aviation markets (commercial, government, and general). A licensee must provide service to aircraft and may not provide ancillary land mobile or fixed services in the 800 MHz air-ground

spectrum.

71. The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

72. Based on Commission data as of December 2021, there were approximately four licensees with 110 active licenses in the Air-Ground Radiotelephone Service. The Commission's small business size standards with respect to Air-Ground Radiotelephone Service involve eligibility for bidding credits and installment payments in the auction of licenses. For purposes of auctions, the Commission defined "small business" as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and a "very small business" as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years. In the auction of Air-Ground Radiotelephone Service licenses in the 800 MHz band, neither of the two winning bidders claimed small business status.

73. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, the Commission does not collect data on the number of employees for licensees providing these services therefore, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

74. *3650–3700 MHz band*. Wireless broadband service licensing in the 3650-3700 MHz band provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (i.e., 3650–3700 MHz). Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis. Wireless broadband services in the 3650-3700 MHz band fall in the Wireless Telecommunications Carriers (except Satellite) industry with an SBA small business size standard that classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

75. The Commission has not developed a small business size standard applicable to 3650–3700 MHz band licensees. Based on the licenses that have been granted, however, we estimate that the majority of licensees in this service are small Internet Access Service Providers (ISPs). As of November 2021, Commission data shows that there were 902 active licenses in the 3650–3700 MHz band. However, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

76. *Fixed Microwave Services*. Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Upper Microwave Flexible Use Service (UMFUS), Millimeter Wave Service (70/80/90 GHz), Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), 24 GHz Service, Multiple Address Systems (MAS), and Multichannel Video Distribution and Data Service (MVDDS), where in some bands licensees can choose between common carrier and non-common carrier status. Wireless Telecommunications Carriers (except Satellite) is the closest

industry with an SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

77. The Commission's small business size standards with respect to fixed microwave services involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in fixed microwave services. When bidding credits are adopted for the auction of licenses in fixed microwave services frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in Part 101 of the Commission's rules for the specific fixed microwave services frequency bands.

78. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

79. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the

microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). Wireless cable operators that use spectrum in the BRS often supplemented with leased channels from the EBS, provide a competitive alternative to wired cable and other multichannel video programming distributors. Wireless cable programming to subscribers resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels.

80. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

81. According to Commission data as December 2021, there were approximately 5,869 active BRS and EBS licenses. The Commission's small business size standards with respect to BRS involves eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of BRS licenses, the Commission adopted criteria for three groups of small businesses. A very small business is an entity that, together with its affiliates and controlling interests, has average annual gross revenues exceed $3 million and did not exceed $15 million for the preceding three years, a small business is an entity that, together with its affiliates and controlling interests, has average gross revenues exceed $15 million and did not exceed $40 million for the preceding three years, and an entrepreneur is an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won 4 licenses, one bidder claiming the very small business

status won three licenses and two bidders claiming entrepreneur status won six licenses. One of the winning bidders claiming a small business status classification in the BRS license auction has an active licenses as of December 2021.

82. The Commission's small business size standards for EBS define a small business as an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than $55 million for the preceding five (5) years, and a very small business is an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than $20 million for the preceding five (5) years. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

83. *Satellite Telecommunications*. This industry comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $35 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 71

providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 48 providers have 1,500 or fewer employees. Consequently using the SBA's small business size standard, a little more than of these providers can be considered small entities.

84. *All Other Telecommunications*. This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of Internet services (e.g. dial-up ISPs) or voice over Internet protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Based on this data, the Commission estimates that the majority of "All Other Telecommunications" firms can be considered small.

85. Because Section 706 of the Act requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

86. *Cable and Other Subscription Programming*. The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (e.g., limited format, such as news, sports, education, or youth-oriented).

These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA small business size standard for this industry classifies firms with annual receipts less than $41.5 million as small. Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year. Of that number, 149 firms operated with revenue of less than $25 million a year and 44 firms operated with revenue of $25 million or more. Based on this data, the Commission estimates that a majority of firms in this industry are small.

87. *Cable Companies and Systems (Rate Regulation*). The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. Based on available data, as of December 2020, there were approximately 45,308,192 basic cable video subscribers in the top Cable MSOs in the United States. Only five cable operators serving cable video subscribers in the top Cable MSOs had more than 400,000 subscribers. Accordingly, the Commission estimates that the majority of cable operators are small.

88. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, contains a size standard for small cable system operators, which classifies "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000," as small. As of December 2020, there were approximately 45,308,192 basic cable video subscribers in the top Cable MSOs in the United States. Accordingly, an operator serving fewer than 453,082 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, all but five of the cable operators in the Top Cable MSOs have less than 453,082 subscribers and can be

considered small entities under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

89. *Electric Power Generators, Transmitters, and Distributors*. The U.S. Census Bureau defines the utilities sector industry as comprised of "establishments, primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer." This industry group is categorized based on fuel source and includes Hydroelectric Power Generation, Fossil Fuel Electric Power Generation, Nuclear Electric Power Generation, Solar Electric Power Generation, Wind Electric Power Generation, Geothermal Electric Power Generation, Biomass Electric Power Generation, Other Electric Power Generation, Electric Bulk Power Transmission and Control and Electric Power Distribution.

90. The SBA has established a small business size standard for each of these groups based on the number of employees which ranges from having fewer than 250 employees to having fewer than 1,000 employees. U.S. Census Bureau data for 2017 indicate that for the Electric Power Generation, Transmission and Distribution industry there were 1,693 firms that operated in this industry for the entire year. Of this number, 1,552 firms had less than 250 employees. Based on this data and the associated SBA size standards, the majority of firms in this industry can be considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance

Requirements

91. The *Second Further Notice* seeks comment on ways to effectively resolve pole replacement disputes through the establishment of standards for when and how utilities and attachers must share in the costs of a pole replacement necessitated by an attachment request. The *Second Further Notice* does not definitively propose any changes to the Commission's current pole attachment rules, but does request that commenters address the legal implications of any rule revisions they propose, which may include reporting, recordkeeping, and other compliance requirements. For example, the *Second Further Notice* seeks comment on whether the Commission has jurisdiction to require utilities to share information concerning the status of utility poles with attachers and, if so, the mechanism through which such information would be provided.

92. The *Second Further Notice* seeks comment on what situations exist in which a pole replacement is not "necessitated solely" by a new attachment request and whether codifying a definition of this phrase would be helpful for parties seeking to comply with Section 1.1408(b) of the Commission's rules. With respect to utility benefits, the *Second Further Notice* seeks comment on how to identify and quantify the costs associated with a pole replacement that are proportional to the direct benefit obtained by a utility from a replacement not necessitated solely by a new attachment request. The *Second Further Notice* also seeks comment on whether the Commission should revise its pole attachment rules to recognize that utilities directly benefit from pole replacements caused by new attachment requests and establish clear standards for when utilities should be required to pay a proportional share of pole replacement costs. Further, the *Second Further Notice* seeks comment on whether the Commission should adopt an express presumption that utilities directly benefit when they use pole replacements precipitated by an attachment request to upgrade or enhance their poles. The Commission then asks how costs should be allocated between utilities and attachers if such a presumption is adopted and whether the Commission should revise its cost sharing rules to require utilities to pay a portion of the

costs of replacing a pole to create capacity for new attachments. The Commission also seeks comment on the scope of utility liability for pole attachment rate refunds when rates are found to be unjust and unreasonable. Should commenters provide compelling arguments, some or all of these proposals could be adopted. The guidance and clarity offered by these proposals would lessen the compliance impact on small utilities and attaching entities with regard to pole replacements and pole attachment rate refunds.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

93. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

94. The *Second Further Notice* does not propose specific changes to the Commission's pole attachment rules, but seeks comment on whether the Commission should revise its rules to eliminate and expedite the resolution of pole replacement disputes between utilities and attachers and provide clarity with respect to the pole attachment rate refund liability for utilities. The Commission's objective in requesting this information is to determine whether it can and should establish clear standards for when and how attachers and utilities must share the costs of a pole replacement precipitated by a new attachment request. In considering the cost allocations, the Commission seeks comment on alternatives that might help smaller utilities and attaching entities. For example, it asks that when a pole needs to be replaced both to accommodate a new attachment and to correct a preexisting violation, whether the new attacher should be responsible for the difference in cost between the taller pole needed for its attachment

and what it would cost to replace the existing pole with one of the same type and size. The Second Further Notice also seeks comment on what other methods of apportioning costs are available in this situation in an attempt to properly balance this burden on different types of entities. Additionally, the *Second Further Notice* seeks comment on the Commission recognizing an express presumption regarding whether utilities directly benefit when they use pole replacements precipitated by an attachment request to upgrade or enhance their poles. The Commission seeks comment on cost allocation alternatives related to the presumption, were it to be adopted, that could be helpful to smaller attachers and utilities. Specifically, the *Second Further Notice asks* whether the new attacher should be responsible for the difference in cost between a taller pole of the same type as the existing pole and the upgraded pole, along with other typical make-ready costs of a new attachment, or if another measure is more appropriate when specific parties are involved. Notably, at the conclusion of the Second Further Notice, the Commission also asks commenters recommending certain cost allocation methodologies to address why their favored solution will expedite pole attachment approvals, benefit consumers, and otherwise be in the public interest. The Commission further seeks comment on the scope of refunds available to attachers when pole attachment rates are found to be unjust and unreasonable. Information submitted in response to these requests for comment will enable the Commission to evaluate the impact that revising its cost sharing and rate refund rules would impact smaller entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

95. None.

III. PROCEDURAL MATTERS

96. *Ex Parte Rules*. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline

applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, then the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with 47 CFR 1.1206(b). In proceedings governed by 47 CFR 1.49(f), or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

97. *Initial Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in the *Second Further Notice*. The text of the IRFA is set forth herein. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice*. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the *Second Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

98. *Contact Person.* For further information about this proceeding, contact Michael Ray, FCC, Wireline Competition Bureau, Competition Policy Division, 45 L Street, NE Washington, DC 20554, (202) 418-0357, Michael.Ray@fcc.gov.

99. *Paperwork Reduction Act Analysis*. This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

IV. ORDERING CLAUSES

100. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 201, and 224 of the Communications Act of 1934, as amended, 47 U.S.C. 151-154, 201, and 224, this Second Notice of Proposed Rulemaking IS ADOPTED.

101. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Second Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene Dortch,

Secretary.

[FR Doc. 2022-09029 Filed: 4/27/2022 8:45 am; Publication Date: 4/28/2022]